QUEEN'S BENCH,

APPEAL SIDE.

H. S. ANDERSON ET AL.,

Appellants,

AND

THE QUEBEC FIRE ASSURANCE COMPANY,

Respondent.

FACTUM OF THE APPELLANTS.

Filed 10 March 1862

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PROVINCE OF CANADA,
LOWER CANADA, to wit:

QUEEN'S BENCH,
APPEAL SIDE.

H. S. ANDERSON et al.,

APPELLANTS,

AND

THE QUEBEC FIRE ASSURANCE COMPANY,

RESPONDENT.

FACTUM OF THE APPELLANTS.

The Case in which the present Appeal has been instituted, was one tried in the Superior Court at Quebec, before a Special Jury, and in which a verdict was rendered upon certain questions submitted to the jury, in compliance with the enactment of the statute regulating trials by jury in civil cases.

In pursuance of that verdict the Plaintiffs in the Court below moved for judgment according to the conclusions of their declaration, while the Defendants moved for the dismissal of the Plaintiffs' action. A motion was also made for a new trial. By judgment pronounced on the 1st day of September 1859, the Court below rejected the motions of the Plaintiffs, accorded the motion of the Defendants and the action was thereupon dismissed. From that judgment the Appellants have brought the present appeal, on the ground, that the verdict was in their favour, and that they should either have had a judgment, or a new trial.

The Case presents the following facts: The Appellants effected insurance with the Respondents, on several objects, in one policy, mentioned and described in the policy in the following terms,—"On the building only of a house, (having a brick apparatus for steaming at ten feet) occupied as a dwelling, situate in the Shipyard belonging to the assured, fronting on Prince Edward Street, St. Roche Suburbs, Quebec, in other respects isolated, built of and covered with wood, Two hundred and fifty pounds.—On the building used as a forge situate in the said Shipyard, in a line with Craig Street, bounded on the north by a wooden stable, belonging to the Proprietors of Dorchester bridge, otherwise isolated, built of and covered with wood, Two hundred and fifty pounds.—On the building only of a store situated on the north-west extremity of the wharf in said Shipyard, bounded at one end at about forty feet by a wooden shed belonging to the assured, and in rear by Anns treet, built of and covered with wood, Four hundred pounds.—On the Wharf on which the above described Store is erected, One hundred pounds." On the occurrence of the loss insured against, by the destruction by fire of the building last mentioned and damages to the wharf, and on breach of the covenants of the Defendants, an action was brought in the usual mode for the recovery of the £400 insured on the building and £100 insured on the wharf. The Respondents met the demand by a plea alleging that Appellants had concealed the fact that Carpenters and Joiners were to be permitted to work in the building insured; that shavings were allowed to accumulate therein; that a stove pipe was carried through the roof; that fire was used, without the building being provided with a stone or brick chimney. Upon this plea the Appellants took issue and the case was submitted to the jury on questions framed to meet the facts in controversy, which questions with the answers of the jury are as follows:—

1o. Was an insurance effected by the Plaintiffs with the Defendants upon the Store in the declaration in this cause described belonging to the Plaintiffs for the sum of four hundred pounds, and upon the wharf therein also described belonging to the Plaintiffs for one hundred pounds, and did the Defendants subscribe and issue the policy of insurance in the said declaration in part recited and continue the same as in the said declaration set forth?

2o. Was any part of the property so insured consumed or damaged by fire, and if so when? and did such fire happen in the manner mentioned in the declaration of the Plaintiffs in this cause filed?

3o. Was any and what manufactory or hazardous occupation carred on in the store mentioned in the said policy at the time the said policy was effected or since, and when, and did the Plaintiffs mention or conceal this fact from the Defendants?

4o. At the time of effecting the said Insurance or afterwards, and if so, when, was any trade or occupation carried on in the said store which occasioned the use of fire heat, and combustibles, and the making of shavings; and was fire used in the said store, and were shavings allowed to accumulate therein while such trade or occupation was so carried on therein? and did the said Plaintiffs make known, or on the contrary did they not make known, the said facts to the Defendants?

5o. At any time the execution of the said policy, was fire used in the said store without the same being provided with a good and substantial brick or stone chimney, and if so when? and was a stove pipe carried through the roof of the said store, at any time after the execution of the said policy, and if so, when?

6o. What is the amount, if any of the Plaintiffs' loss by the fire mentioned in their declaration, upon the said store;

7o. What is the amount, if any, of the Plaintiffs' loss, by the fire mentioned in their declaration, upon the wharf mentioned in this cause and in the said policy of insurance?

Answers of the Jury:—

To the 1st question. Yes.

To the 2nd question. Yes, on the 31st of March 1857, the said store was wholly consumed, and the said wharf partially injured by fire.

To the 3rd question. None at the time the policy was effected, but carpenters and joiners were at work subsequently in the building, and there was no concealment. The fact was not mentioned by the Plaintiffs to the Defendants.

To the 4th question. To the first part of the question, that is, that part of the question which refers to the time at which the policy was granted; no trade or occupation was carried on in the said store which occasioned the use of fire heat, or combustibles, or the making of shavings.

As to the second part of the question by which we mean that part which refers to the time after the effecting of the said insurance: Shavings were made but there is nothing to show that they were allowed to accumulate, and a trade was carried on which occasioned those shavings. In reply to the latter part of this question referring to the fact whether the Plaintiffs made known or not, the facts there referred to the Defendants we say "the Plaintiffs were silent."

To the 5th question. No stove pipe was carried through the roof, nor was there a good and substantial chimney in the building, but there was a fire occasionally made.

To the 6th question. Four hundred pounds.

To the 7th question. One hundred pounds.

And so they say all."

The result of the case has been already stated, and the nature of the judgment on the verdict.

It is clear that the case must now be considered, on the finding of the jury alone, and that the facts which they have certified must be accepted as the facts of the case, to the exclusion of all other evidence.

Before proceeding to notice these facts and their bearing upon the issue, it is important to impress upon the Court, that by the terms of the policy, there were effected—*Two* separate insurances, one upon the store £400, and the other upon the wharf £100, altogether independent one of the other, and that the Appellants might be entitled to one, or the other, or both, according to circumstances. How the case may be affected by this circumstance will be hereafter adverted to. At present the Appellants desire to draw the attention of the Court to the facts of the case as bearing upon both insurances, and entitling them to recover the whole amount of their loss. With this view, analysing the verdict of the Jury and excluding the answers to these questions about which no difficulty arises, the answers to the 3rd, 4th, & 5th questions, alone merit consideration. By these answers it is established, that carpenters and joiners were, for a time, at work in the building; that a trade was carried on which occasioned shavings; that shavings were not allowed to accumulate; that no concealment was practised by the Appellants; that no stove pipe was carried through the roof as alledged; that a fire was occasionally made, and that the Store was not provided with a good and substantial chimney. So that, by a further elimination of unimportant matter, two points only of enquiry present themselves, namely as to the employment of carpenters and as to the use of fire.

Now, on the first of these two points it is to be observed that the building was insured and had been so for a succession of years as a Store in a Shipyard, in conjunction with a forge and all the other adjuncts of an establishment devoted to naval architecture. The

Appellants claim that the Respondents insured against the risks involved in the known and necessary processes of ship building. Were not the Insurers bound, more especially in a place like Quebec, the seat of this species of commerce and manufacture, to know that such an employment of the premises was intended and necessary, and did they not assume that risk, when insuring a complete establishment of which this building, to accomodate minor works of ship carpentery, such as the trimming of masts and yards, formed a necessary part? Is it not a legitimate conclusion to draw, from the terms of the policy that this risk was contemplated? The Jury have found that there was no concealment of this circumstance, and indeed the very terms of the policy would indicate that the insurers were made formally aware of it when undertaking the risk. It is well known that insurance policies are drawn with special care to protect the insurers, that the insured have but a limited control over the terms of the instruments, and that they require to be construed liberally in favor of the assured. For the Insurers in this case, who have insured these premises for a succession of years as a Ship Manufactory, to urge such a plea as that put forward in this case, is calculated to shake all confidence in them, and it would really be for their advantage that the Court should refuse to countenance such attempts to escape from responsibility. On the second point,—the use of fire, the Court will perceive that the Jury have limited their finding to an *occasional* use of fire, and this occasional use will be found by the Court to have amounted to one or two occasions, not for the purpose of heating, but for the purpose of facilitating some operation of the workmen, and made by them. This the Appellants contend does not come within the contemplated prohibition, which applies only to a permanent and habitual use of fire so as to create a different risk, and the jury have accordingly expressed their opinion in this matter by the limitation of their finding. Had the insurers traced the fire to have originated from this cause, the case would have assumed another complexion, but this is neither alleged nor proved, it being on the contrary established, that there was no fire in the building for hours before, and the origin of the fire so far as traced, is supposed to have been external, from the wharf, outside the building, and caused by some incendiary.

On the subject of the separate insurances on the wharf and on the building as already adverted to, the causes which might defeat the recovery of the insurance on the building have no application whatever to the wharf, and the verdict establishes merely this—that the wharf was insured—was damaged—and that the damage amounts to £100. No connection is established between the two insurances or risks, and if the evidence be consulted, it will be seen that the fire was communicated from the wharf to the building, and not from the building to the wharf.

With reference to the motion for a new trial, the Appellants do not ask it, as repudiating the verdict of the jury, but being limited to making that motion within a certain delay, thought it prudent to place it within the power of the Court to order a new trial in the event of the answers of the jury not being considered conclusivly satisfactory on the issue.

This Court will also perceive from the judgment itself of the Court below, that that Court has committed error, in assuming facts from the evidence to base the judgment, and that, in opposition to the finding of the jury, whose answers must be accepted as conclusive as to fact.

The Appellants conceiving that the terms of the policy covered all the risk as proved, that the jury have negatived all the important allegations of the Respondents tending to defeat the Appellants' claims, and have so qualified the other allegations of the defense as to legally negative those also, look for the reversal of the judgment appealed from, and for a judgment awarding to them the full amount of their insurance.

ANDERSON & PARKIN.

Attorney for Appellants.

Quebec, February, 1860.